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SUPREME COURT, STATE OF COLORADO

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Case No. 93 SA 017

On Appeal from the District Court, City and County of Denver
H. Jeffrey Bayless, Judge; Case No. 92 CV 7223

REPLY BRIEF

RICHARD G. EVANS, ANGELA ROMERO, LINDA FOWLER, PAUL BROWN, JANE DOE, MARTINA NAVRATILOVA, PRISCILLA INKPEN, JOHN MILLER, THE BOULDER VALLEY SCHOOL DISTRICT RE-2, THE CITY AND COUNTY OF DENVER, THE CITY OF BOULDER, THE CITY OF ASPEN, AND THE CITY COUNCIL OF ASPEN,

Plaintiffs-Appellees,

v.

ROY ROMER, as Governor of the State of Colorado, GALE A. NORTON, as Attorney General of the State of Colorado, and the STATE OF COLORADO,

Defendants-Appellants.

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Pursuant to C.A.R. 28(c), the Defendants-Appellants ("Defendants") hereby file their Reply Brief.

INTRODUCTION

The core arguments advanced by the Plaintiffs-Appellees ("Plaintiffs") in their Answer Brief were fully considered and rejected by the court below.[1] Indeed, the most striking aspect of the Answer Brief is that the Plaintiffs have sought to distance themselves as much as possible from the lower court's ruling. Rather than defending the reasoning of the lower court's order, the Plaintiffs have attempted in vain to rationalize the holding "as best construed to mean that Amendment 2 violates the plaintiffs' fundamental right of political participation . . . ." Ans. brf. at 19 n.19. Thus, this Court is presented with the curious situation in which both the Plaintiffs and the court below have rejected the legal reasoning of the other.

The Plaintiffs claim that the "defendants misunderstand -- and do not address the plaintiffs' argument." Ans. brf. at 19. However, it is the Plaintiffs who do not understand the appellate process. The Defendants had the obligation to address the actual ruling of, and not those arguments rejected by, the court below. Indeed, it has not become incumbent upon the Defendants to respond

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[1]The Plaintiffs attempt to claim that they argued below that Amendment 2 should not override home rule authority "because its text omits 'charters' from the list of forbidden government legislation." Ans. brf. at 3. However, nowhere in briefs, argument, or testimony did the Plaintiffs ever raise this issue. Similarly, they never claimed that Amendment 2 discriminated on the basis of gender; nor did they claim, for purposes of the preliminary injunction hearing, that Amendment 2 was vague.

to those rejected arguments until this time, when the Plaintiffs have conceded the lower court's order is legally untenable, and sought to fashion an alternate basis for the injunction.

Throughout their Answer Brief, the Plaintiffs seek to convert the lower court's legal conclusions into findings of fact, thereby hoping this Court will not disturb those conclusions, absent clear error. E.g., Ans. brf. at 28 (citing no legal authority).[2] This, of course, is wrong, since legal conclusions are reviewed under a de novo standard. E.g., Bloomer v. Boulder County Bd. of Comm'rs, 799 P.2d 942, 944 (Colo. 1990). In fact, after four days of testimony, the court below did not make a single finding of fact.[3] In any event, the record is in large part immaterial to this appeal, because the case turns wholly upon legal issues.[4]

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[2]The Defendants will address the more significant examples of this practice in the body of the brief.

[3]For example, the Plaintiffs' exegesis regarding the so-called "religious right" serves no legally relevant purpose to this litigation, and only exacerbates public and private divisiveness on this issue. Further, the Plaintiffs' exploration of the motives behind certain individual proponents or supporters of Amendment 2, if accepted by the Court as fact, would profoundly undermine voter sovereignty in this State and directly attack the political and constitutional structure presently in place. The sole question now before this Court is whether Amendment 2 is consistent with the Constitution of the United States, not whether it is appropriate or desirable to adopt a particular social or political ideology. E.g., Harris v. McRae, 448 U.S. 297, 326 (1980)(courts cannot "overturn duly enacted statutes simply 'because they may be unwise, improvident, or out of harmony with a particular school of thought.'") The political debate was fought in the election and need not be fought again in this appeal.

[4]The Plaintiffs reference the record in an attempt to establish certain facts, by inviting this Court to improperly assume the role of finder of fact. Ans. brf. at 5-17. However, many of these allegations are controverted, and no finding of fact was made by the court below.

To that end, both the Plaintiffs and the court below have attempted to justify the invalidation of Amendment 2 through novel theories founded upon inapposite legal precedent. This Court should reject such approaches in favor of traditional jurisprudence. It is important to bear in mind that the Plaintiffs have challenged Amendment 2 as facially unconstitutional. To this end, they have sought to create the most extreme or absurd interpretations of Amendment 2 possible.[5] However, in a facial challenge it is not this Court's charge to seek out every potential abuse or misapplication of Amendment 2. Rather, in addition to the normal presumption of constitutionality which must be accorded to any act of the people, City of Glendale v. Buchanan, 195 Colo. 267, 578 P.2d 221, 224 (1978), the Plaintiffs also bear the burden of demonstrating, beyond a reasonable doubt, People v. Ford, 773 P.2d 1059, 1062 (Colo. 1989), that under no set of facts can Amendment 2 be susceptible of any possible constitutional interpretation or application. United States v. Salerno, 481 U.S. 739, 745 (1987). As will be shown below, the Plaintiffs cannot hope to meet this high burden.

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[5] E.g., the Plaintiffs' incredible suggestion that Amendment 2 would bar protective custody for homosexuals in municipal jails must at best be regarded as fanciful. Ans. brf. at 14. A protective, administrative segregation system is premised upon concerns for inmate safety, a concern independently mandated by the federal constitution's protection against cruel and unusual punishment. See, e.g., Ramos v. Lamm, 639 F.2d 559, 572 (10th Cir. 1980). Protective custody is not accorded on the basis of sexual orientation; even in the absence of the Eighth Amendment, protective custody would remain available to all prisoners on the basis of need for safety.

ARGUMENT

I. AMENDMENT 2 IS NEITHER OVERBROAD NOR VAGUE

The Plaintiffs complain that Amendment 2 is overly broad because its "plain language" deprives homosexuals and bisexuals of: (1) the assistance of law enforcement authorities in criminal matters; (2) redress in the civil courts for contract and tort actions; and (3) redress in the courts with respect to federal civil rights actions.[6] However, if the Defendants' construction of the amendment is correct, then, the Plaintiffs say, Amendment 2 is impermissibly vague. The Plaintiffs are wrong on both counts.

A. The Plaintiffs Misconstrue the Clear Language of Amendment 2

In assessing what Amendment 2 means, the Plaintiffs point only to those terms which constrain "departments" from "enforc[ing]" "any" "statute, regulation . . . or policy" giving rise to "any . . . claim of discrimination." The Plaintiffs wholly ignore the

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[6]The Plaintiffs also suggest this "sweep[s] aside every potential means of redress," violating their First Amendment right of expressive association by increasing the risk of private retaliation. Ans. brf. at 17 n.17. Even assuming the correctness of the Plaintiffs' rather extraordinary assessment of the amendment's effect, increased risk of negative reaction from private parties does not constitute a violation of the First Amendment. See Student Government Ass'n v. Board of Trustees of the Univ. of Massachusetts, 868 F.2d 473, 479 (1st Cir. 1989)(government is under no obligation to remove barriers to expression that are not created by the government). N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) is inapposite. There, the State wished to compel a form of expression which would inevitably lead to the private retaliation against specific individuals. The present case involves neither a compulsion nor a prohibition on expression.

title of the amendment ("No Protected Status . . .") as well as certain pertinent terms ("protected status," "minority status," and "quota preferences") which provide context for the specific language they complain about. A provision's title is indicative of legislative intent, see, e.g., City of Ouray v. Olin, 761 P.2d 784 (Colo. 1988),[7] and it is elementary that, in interpreting a provision, "words, phrases, [and] clauses . . . must be construed in connection with, and in relation to, the rest of the paragraph." E.g., People ex rel. Marks v. District Court, 161 Colo. 14, 21-22, 420 P.2d 236, 240 (1966); Rodriguez v. Nurseries, Inc., 815 P.2d 1006, 1008 (Colo. App. 1991).

Indeed, "a clause which, standing alone, might seem of doubtful import, may yet be made plain by a comparison with other clauses or portions of the same law." Martinez v. People, 111 Colo. 52, 59, 137 P.2d 690, 693 (1943). And where "general words follow a particularized enumeration of types, the interpretive rule of ejusdem generis counsels that general words, at least in the absence of any manifest legislative intent to the contrary, should be construed 'as applicable only to persons or things of the same general nature or class as those enumerated.'" Colorado Common Cause v. Meyer, 758 P.2d 153, 162 (Colo. 1988).

Applying these principles here, it is clear that the contested language does not carry with it the far-reaching and draconian

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[7]Section 2-5-113, C.R.S. (1980), prohibits consideration of headings or titles which are subsequently added by the Revisor of Statutes; it does not, however, prohibit consideration of titles which were before the voters at the time the measure was enacted. See, e.g., In the Matter of U.M., 631 P.2d 165, 167 (Colo. 1981).

ramifications the Plaintiffs suggest; rather, it prohibits only the recognition or enforcement of state or locally created civil rights protections above and beyond those required by federal law. At the very most, the title and terms create an ambiguity which is readily resolved against the Plaintiffs' overly broad interpretation of the amendment through a review of pertinent legislative history.[8]

Remarkably, the Plaintiffs stated that Amendment 2 purports to remove from this State's judiciary the power to adjudicate claims of discrimination arising under federal law.[9] Such an argument betrays a fundamental misunderstanding of both federalism and the Supremacy Clause, U.S. Const. art. VI, cl. 2, to say nothing of the clear language of Amendment 2.[10]

The Plaintiffs also believe Amendment 2 purports to render the Colorado courts powerless to hear federal discrimination claims of homosexuals and bisexuals. However, simply reading the language reveals that although the judiciary may not enforce statutes, regulations, ordinances, and policies granting special rights to

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[8]That the amendment was not designed to deprive homosexuals and bisexuals of their basic civil rights is clearly reflected in the Legislative Council's analysis; so too is the fact that "the amendment would not affect antidiscrimination policies based on sexual orientation that have been adopted by numerous private employers." See Defendants' Exhibit "C": Legislative Council of the Colorado General Assembly, An Analysis of 1992 Ballot Proposals 10-11 (Research Pub. 369, 1992).

[9]Of course, if the Plaintiffs are correct in this contention, then this Court is without power to hear the instant case.

[10]How it is possible for the Plaintiffs, in light of the arguments advanced in the Opening Brief, to contend that the Defendants have "conceded" Amendment 2 is unconstitutional defies understanding. Amendment 2 is patently constitutional in every respect.

homosexuals and bisexuals, federal constitutional provisions are not mentioned. Similarly, the Plaintiffs misapprehend the nature of preemption. Any federal statute which might conflict with Amendment 2 would of course take precedence; however, this simple operation of law would not call Amendment 2's constitutionality into question. See, e.g., Pennsylvania v. Nelson, 350 U.S. 497, 500 (1956)(The fact that the federal government currently preempts an area "does not affect the right of States to enforce their . . . laws at times when the Federal Government has not occupied the field . . . .")[11]

The Plaintiffs disregard -- and hope that this Court will too -- the well-established principle that a court has an obligation to construe a statute in such a manner as to avoid constitutional infirmities. E.g., Exotic Coins, Inc. v. Beacom, 699 P.2d 930, 947-48 (Colo. 1985). See also Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1974)("a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state court . . . .") The obligation to seek a constitutional interpretation is even more appropriate when the challenged act is a constitutional provision adopted by a vote of the people. This is easily accomplished here: looking at the object of Amendment 2, this Court can give effect to the voters' intent by construing the amendment to mean that not all claims of discrimination are unenforceable, just those geared specifically to attempts by state and local entities to provide civil rights

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[11]See also Tua v. Carriere, 117 U.S. 201, 231-32 (1886).

protections for homosexuals and bisexuals beyond those required by federal law.

B. Amendment 2 Is Not Impermissibly Vague

Such an interpretation does not render Amendment 2 subject to invalidation on vagueness grounds.[12] First, assuming arguendo that this question is properly before the Court,[13] the void-for-vagueness doctrine is actuated primarily by the imposition of sanctions upon affected persons. The policy underlying the doctrine is the fundamental unfairness of penalizing individuals who had no reason to believe their conduct was forbidden.[14] Here, Amendment 2 imposes no duty or responsibility, or threat of sanction, upon any private parties, including the individual Plaintiffs; it simply limits certain kinds of governmental conduct, and the affected governmental entities are not "persons" entitled to the protections of the Due Process Clause. See, e.g., Board of County Comm'rs v. City and County of Denver, 150 Colo. 198, 205, 372 P.2d 152, 156 (1962).

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[12]The Plaintiffs contradict themselves by claiming that Amendment 2 will inevitably give rise to the extreme results they imagine, while at the same time maintaining that it is unconstitutionally vague.

[13]The Plaintiffs never urged this as a ground upon which a preliminary injunction should be granted.

[14]See, e.g., Sellon v. City of Manitou Springs, 745 P.2d 229, 233 (Colo. 1987)(in order to succeed on a vagueness challenge, the provision must fail to "provide fair notice of what conduct is prohibited, or fail to provide law enforcement authorities with sufficiently definite standards of nonarbitrary, nondiscriminatory enforcement of the law.")

Second, the void-for-vagueness doctrine is particularly inappropriate for gauging the validity of constitutional provisions, which, because of their very nature, are expected to have a fairly broad, rather than specific, meaning. For example, despite all the questions which have arisen over the past century about what constitutes "religion," "a preference," or "the free exercise and enjoyment of religious profession and worship," no one would suggest that the Religion Clauses of the Colorado Constitution, art. II, § 4, are facially invalid under the vagueness doctrine of the federal constitution. For that matter, the notion of due process, upon which the vagueness doctrine is founded, is itself "an elusive concept," whose "exact boundaries are undefinable, and its content varies according to specific factual contexts." Hernandez v. Cremer, 913 F.2d 230, 237 (5th Cir. 1990). "The vagueness test 'is not an exercise in semantics to emasculate legislation; rather, it is a pragmatic test to ensure fairness.'" Parrish v. Lamm, 758 P.2d 1356, 1368 (Colo. 1988).[15] Consequently, the Plaintiffs' vagueness challenge must be rejected.

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[15]See also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 497-99 (1982). Amendment 2 is sufficiently precise to withstand a vagueness challenge. See generally United States v. Young, 864 F.2d 188, 194 (D.C. Cir. 1988)(vagueness challenge rejected even where First Amendment implicated).

II. AMENDMENT 2 DOES NOT IMPERMISSIBLY BURDEN ANYONE'S PARTICIPATION IN THE POLITICAL PROCESS

Amendment 2 is subject to strict scrutiny review if, and only if, it impacts a suspect class, or infringes upon a fundamental right. The Plaintiffs cannot argue that they are members of a suspect class because they abandoned that claim in the court below for purposes of the preliminary injunction hearing. v. 1, pp. 163-64. Cf. Ans. brf. at 20 n.20.[16] Similarly, the Plaintiffs cannot complain that Amendment 2 burdens a fundamental right to "participate in the political process," because there is no such "right." The inevitable consequence of such a theory would be social and political chaos: all policy choices would have to be at the lowest governmental level possible. This claimed "right" amounts to a right to obviate the people's ability to structure their own government in a manner they see fit.

The Plaintiffs continue to have the ability to participate fully in all of Colorado's political processes; what they do not have is a right to successful participation in the process. The Plaintiffs seek to fabricate a "fundamental" right through selective incorporation of principles surrounding the independent

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[16]For the first time in this case, the Plaintiffs have introduced a variation on this theme, claiming in their Answer Brief that Amendment 2 also discriminates on the basis of gender. This argument is meritless. E.g., DeCintio v. Winchester County Medical, 807 F.2d 304, 307-08 (2d Cir. 1986)(gender discrimination is grounded on distinctions "based on a person's sex, not on his or her sexual affiliations"); DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (same); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187, 1193-95 (1974)(Washington's Equal Rights Amendment not implicated by prohibition of same sex marriages).

fundamental rights to petition and vote, as well as the Equal Protection Clause of the Fourteenth Amendment. Such an effort is meritless.[17]

The Plaintiffs rely upon a footnote in a recent California Court of Appeals case to argue that Amendment 2 restricts the right to petition the government "because the right becomes a hollow exercise if the local government has been deprived of the power to grant redress of the subject grievance." Ans. brf. at 23 (citing Citizens for Responsible Behavior, 2 Cal. Rptr. 2d 648, 655 n.9 (Cal. App. 4th Dist. 1991)). However, there is no requirement that legislative, executive, and judicial bodies be allowed to act with respect to every conceivable viewpoint. See, e.g., Smith v. Arkansas State Highway Employees, Local 1315, 441 U.S. 463, 464-65 (1979)(the First Amendment does not "impose any affirmative obligation on the government to listen or to respond . . . .") Indeed, there is no right to vote or petition for those matters which are beyond the competence of a governmental entity to address. See generally Higginson, A Short History of the Right to Petition Government for the Redress of Grievances, 96 Yale L.J. 142, 142-43, 159-61, 165-66 (1986).

The Plaintiffs' reliance upon cases such as Reynolds v. Sims, 377 U.S. 533, 565 (1964), Kramer v. Union Free School Dist., 395 U.S. 621, 627 (1969), Norman v. Reed, 112 S. Ct. 698 (1992), and Gordon v. Lance, 403 U.S. 1 (1971), is similarly misplaced. Each

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[17]For the same reasons, the legal arguments of amici Colorado Bar Association, et al., are meritless.

of these cases concerns the right to vote, specifically the relative weight of individual votes.[18] That is, at root these cases stand for the proposition that the right to vote is abridged if one voter cannot exercise it as fully -- with the same amount of weight -- as other voters. These cases do not concern the range of issues that all voters may or may not vote upon. They certainly do not implicate a restructuring of the overall political process, which is solely an equal protection issue.

Amendment 2 does not, after all, present a case where homosexuals and bisexuals have been denied the right to vote in upcoming general elections,[19] nor where reapportionment or other

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[18]Reynolds v. Sims simply struck down a state governmental plan where state senators represented geographic areas rather than people. In effect, it stands for the proposition that the right to vote, read together with the Equal Protection Clause, requires the representation of like numbers of people, rather than geographic areas. Cf. Lucas v. Forty-Fourth Colorado General Assembly, 377 U.S. 713 (1964). Kramer v. Union Free School Dist. struck down restrictions on the ability of non-property owners and non-parents to vote in school board elections. As such, it simply stands for the proposition that the right to vote may not be voided on the basis of whether one is a property owner or a parent. Accord Cipriano v. City of Houma, 395 U.S. 701 (1969). Norman v. Reed prohibits inconsistent standards for different political parties to be placed upon the ballot. In the present case, nobody is denied the right to vote simply because they are homosexual or bisexual.

In Gordon v. Lance, the Supreme Court upheld a scheme which required a 60% vote in order to issue bonded indebtedness, finding no "discrete and insular minority" had been singled out for special treatment. 403 U.S. at 5. These cases all turn on a violation of the right to vote, or a classification burdening a suspect class, or a combination of the two.

[19]See Hill v. Stone, 421 U.S. 289 (1975)(invalidating provision limiting voters in city bond elections to persons who have listed property for taxation); Kramer v. Union Free School Dist., 395 U.S. 621 (1969)(invalidating provision limiting voters in school district election to persons owning or leasing taxable real property or parents or custodians of children enrolled in schools).

state action has diluted the value of their individual votes.[20] Unless the individual Plaintiffs can demonstrate that they are a suspect class, they must relinquish the claim that Amendment 2 violates the Equal Protection Clause by requiring them to obtain the assent of the people of Colorado before acquiring special legal protections.

The Plaintiffs point to several federal cases which, properly analyzed, again do not support their position. In Reitman v. Mulkey, 387 U.S. 369 (1967), the U.S. Supreme Court reviewed a voter-initiated state constitutional amendment which the state court construed as intended to encourage and authorize racial discrimination. Of course, race had been identified as a suspect classification long before Reitman,[21] and "[t]he Supreme Court . . . never has relied on Reitman as controlling authority." Note, The *Hunter* Doctrine: An Equal Protection Theory That Threatens Democracy 38 Vand. L. Rev. 397, 405 (1985).

Similarly, in Hunter v. Erickson, 393 U.S. 385 (1969), the Court was concerned with an amendment to a city charter which repealed a racial anti-discrimination ordinance, and required voter approval before that type of ordinance could be put into effect. Characterizing the amendment as placing "special burdens on racial minorities within the governmental process," 387 U.S. at 391, the

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[20]See Reynolds v. Sims, 377 U.S. 533 (1964). See also Mrazek v. Suffolk County Bd. of Elections, 630 F.2d 890, 898 (2d Cir. 1980) ("The one-person, one-vote doctrine requires no more, and does not create rights and privileges beyond the warranty of mathematical equivalency of votes.")

[21]See Strauder v. West Virginia, 100 U.S. 303, 306-07 (1880).

Court noted:

> Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are 'constitutionally suspect' and subject to the 'most rigid scrutiny.' They 'bear a far heavier burden of justification' than other classifications.

Id. at 391-92 (citations omitted).[zz]

Two years after Hunter, the Supreme Court was asked to apply it in James v. Valtierra, 402 U.S. 137 (1971), a case concerning the validity of a California constitutional measure prohibiting state public bodies from developing, constructing, or acquiring low income housing projects without prior approval by a majority vote in a city, town, or county referendum. A lower court had ruled, based on its reading of Hunter, that the California measure unconstitutionally discriminated against poor people in the right to seek redress from governmental entities. On appeal, however, the Supreme Court disagreed, finding that, unlike Hunter,

> it cannot be said that California's Article XXXIV rests on 'distinctions based on race.' . . . . The present case could be affirmed only by extending Hunter, and this we decline to do. . . . [Appellees] suggest that the mandatory nature of the Article XXXIV referendum constitutes unconstitutional discrimina-

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[zz]A year later, a federal district court considered a statute barring state education officials and appointed school boards from taking action to integrate schools. That court noted that "[t]he principle of Hunter is that the state creates an 'explicitly racial classification' whenever it differentiates between the treatment of problems involving racial matters and that afforded other problems in the same area." Lee v. Nyquist, 318 F. Supp. 710, 718-20 (W.D.N.Y. 1970), aff'd, 402 U.S. 935 (1971). See also Tyler v. Vickery, 517 F.2d 1089, 1099 (5th Cir. 1975)(characterizing Hunter as striking "down a city charter amendment requiring voter approval of certain antidiscrimination ordinances on the ground that the amendment created a classification based on race.")

> tion because it hampers persons desiring public housing from achieving their objective when no such roadblock faces other groups seeking to influence other public decisions to their advantage. But of course a law-making procedure that 'disadvantages' a particular group does not always deny equal protection. Under any such holding, presumably a State would not be able to require referendums on any subject unless referendums were required on all, because they would always disadvantage some group.

402 U.S. at 141-42.

Eleven years later, Justice Lewis F. Powell echoed some of the very same sentiments:

> The political process in Washington, as in other States, permits persons who are dissatisfied at a local level to appeal to the state legislature or the people of the State for redress. It permits the people of a State to pre-empt local policies, and to formulate new programs and regulations. Such a process is inherent in the continued sovereignty of the States. This is our system. Anytime a State chooses to address a major issue some persons or groups may be disadvantaged. In a democratic system there are winners and losers. But there is no inherent unfairness in this and certainly no constitutional violation.

Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 496 (1982)(Powell, J., dissenting).

The Seattle School District case concerned a voter-initiated statute which removed the power of school boards to order busing to desegregate schools. Admittedly, Justice Powell's comments were made in the course of a vigorous dissent on behalf of four members of the Court. However, these comments lose none of their persuasive value in the present context since the majority opinion in that case rested squarely on "an immediate and crucial

difference" from the present case: a race-based classification. Indeed, the majority wrote:

> the political majority may generally restructure the political process to place obstacles in the path of everyone seeking to secure the benefits of governmental action. But a different analysis is required when the State allocates governmental power nonneutrally, by explicitly using the racial nature of a decision to determine the decision-making process.

458 U.S. at 470 (emphasis in original). Later in that same opinion, the majority wrote:

> When the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the 'special condition' of prejudice, the governmental action seriously 'curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities.' In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'

458 U.S. at 486.

Properly analyzed, then, Reitman, Hunter, Valtierra, and Seattle School District are not fundamental rights cases; rather, they recognize a cause for constitutional equal protection complaint only when the political process has been restructured to place unusual burdens upon racial groups,[23] or, in the most expansive sense, upon "those groups . . . relegated to such a

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[23]See Note, The Hunter Doctrine: An Equal Protection Theory That Threatens Democracy, 38 Vand. L. Rev. 397, 421-26 (1985)(Hunter doctrine limited to state action embodying a racial classification).

position of political powerlessness as to command extraordinary protection from majoritarian political process." Seattle School District, 458 U.S. at 486.[24] These latter groups are, of course, the few which have been identified as "suspect" classes.[25]

Of course, the flaw in the Plaintiffs' reasoning is laid bare by the fact that they have themselves have created the so-called "religious right" as an identifiable group.[26] Under the Plaintiffs' theory, members of the "religious right" in Boulder would have a cause of action regarding that city's sexual orientation provision, which is antithetical to their interests and beliefs. Significantly, members of this identifiable group could not overturn the provision through the city council, but instead

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[24]The Plaintiffs believe it significant that the earliest voting cases did not involve suspect class. Ans. brf. at 26. This belies a misapprehension of the Defendants' arguments. As discussed in the Opening Brief at 18-19, strict scrutiny only applies when either a suspect class or fundamental right is implicated. No suspect class is here present, and the right to vote is not abridged. Inasmuch as there is no fundamental right to successfully participate in the political process, the Plaintiffs' arguments must fail.

[25]See San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 28 (1973)(cited in Seattle School District; "political powerlessness" phrase used to describe suspect class); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313 (1976)(reiterating Rodriguez test for suspect class; also, correlating the "discrete and insular minorities" language of United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938) to the concept of "suspect" class). See also Citizens for Responsible Behavior, 2 Cal. Rptr. 2d 648, 655 (Cal. App. 4th Dist. 1991) ("Hunter was a 'strict scrutiny' case in which the law invalidly classified the affected parties on the basis of traditionally suspect characteristics.")

[26]The Plaintiffs' witness testified that, in her view, 15%-20% of the American populace belong to the "religious right." v. 5, p. 105.

would be forced to prevail in a city wide vote. (v. 5, p. 50). Similarly, if the General Assembly had enacted sexual orientation protections in the state civil rights laws, as the homosexual community has advocated, the "religious right" would have been deprived of the ability to seek redress from local officials. Of course, there are an unlimited number of identifiable groups which might be adversely affected by any distinction made by the law.

That this is so is demonstrated by the myriad of distinctions found in other provisions of the Colorado Constitution which adversely affect the ability of certain identifiable groups to achieve their political ends, without a constitutional amendment. For example, the Colorado Constitution places burdens upon identifiable groups who desire abortion funding,[27] the reelection of incumbent officials,[28] reorganization of certain school districts,[29] certain municipal annexations,[30] and limited gaming.[31]

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[27]By virtue of Colo. Const. art. V, § 50, the State is prohibited from spending public funds to assist, financially or otherwise, in the inducement of abortion except in very narrow circumstances. Abortion advocates must seek a constitutional amendment to fund this particular medical procedure; advocates for any other medical procedure need only seek a statute. These types of provisions have been upheld by the U.S. Supreme Court. See Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977), and; Harris v. McCrae, 448 U.S. 297 (1980).

[28]Colo. Const. art. XVIII, § 9(a) limits the terms of state legislators, thereby preventing the identifiable group of supporters of particular incumbents from voting for the candidate of their choice. See also Colo. Const. art. IV, § 1, and art. V, § 3. However, this is nothing more than an appropriate reordering of the State's political structure.

[29]Colo. Const. art. XX, § 7 establishes a single school district for the City and County of Denver. Although the residents of any other school district may divide or reorganize their district by obtaining a statute to that effect, residents of Denver must

In fact, the Colorado Constitution even imposes burdens upon persons seeking to use the amendment process itself.[32]

The "right" urged by the Plaintiffs can only work when applied to suspect classifications;[33] any other application necessarily mandates that all legal and policy choices be made at the lowest governmental level possible.[34] Otherwise, some identifiable group will have its rights trodden upon. The fundamental fallacy of the Plaintiffs' theory is that fundamental rights obtain to each

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obtain a constitutional amendment. Again, no constitutional right is implicated.

[30]Colo. Const. art. XX, § 1 and art. XIV, § 3, prevent the City and County of Denver from annexing land in any manner other than as a county. The citizens of Denver bear a greater burden than other Colorado citizens, but this presents no cognizable constitutional question. Cf. City and County of Denver v. Buchanan, 714 P.2d 1352 (Colo. App. 1986) and City of Glendale v. Buchanan, 195 Colo. 267, 578 P.2d 221 (1978).

[31]Colo. Const. art. XVIII, § 9 allows limited gaming only in Central City, Black Hawk, and Cripple Creek. All other Colorado communities must obtain a constitutional amendment to permit certain types of gambling.

[32]Colo. Const. art. XIX, § 2 prohibits the General Assembly from proposing amendments to more than six articles of the constitution. This, of course, presents a barrier to political participation of the people through the General Assembly.

[33]Indeed, Professor Lawrence Tribe's comprehensive analysis reveals that Reitman, Hunter, and Seattle School District do not concern "rights of political participation," but rather discrimination against "discrete and insular minorities." Compare ch. 13 ("Rights of Political Participation"), with ch. 16 ("The Model of Equal Protection.") L. Tribe, American Constitutional Law (2d ed. 1988).

[34]Cf. Washington v. Seattle School Dist. No. 1, 458 U.S. 457, 480 n.23 (1982)(The Supreme Court has not created a "vested constitutional right to local decisionmaking," but rather objects to a burden imposed "on minority participation in the political process -- that is, the racial nature of the way in which it structures the process of decisionmaking.")(emphasis in original).

individual on the basis of their citizenship -- they are not conferred by virtue of membership in a "group." Equal protection concerns itself with classifications between groups, but fundamental rights inhere solely in individuals, precisely because they are individuals.

In truth, the Plaintiffs' newly-found "right" to equally participate in the political process is little more than a prescription for social and political chaos. Any distinction made by government in the establishment of its political structure would be vulnerable to constitutional attack because it reorders societal priorities; indeed, the Plaintiffs' theory strikes at the heart of voter sovereignty and the initiative process. This Court should not be a partner in such a foolhardy enterprise.

III. AMENDMENT 2 IS SUPPORTED BY ADEQUATE RATIONAL BASES

Generally, it is the party challenging a measure which must convince the Court beyond a reasonable doubt of its unconstitutionality. E.g., People v. Ford, 773 P.2d 1059, 1062 (Colo. 1989). Citing City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985)(plurality opinion), however, the Plaintiffs claim it is the State which bears the burden of producing evidence in support of Amendment 2. Yet, much more recently than Cleburne, the U.S. Supreme Court has recognized that, in reviewing the validity of a state constitutional provision enacted by the people, "'those challenging the . . . judgment [of the people] must convince the court that the . . . facts on which the classification is

apparently based could not reasonably be conceived to be true by the . . . decisionmaker.'" Gregory v. Ashcroft, 111 S. Ct. 2395, 2407-08 (1991)(ellipses and brackets in original)(quoting Vance v. Bradley, 440 U.S. 93, 111 (1979). Moreover, the Court noted, a voter-approved provision will not be overturned "'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's] actions were irrational.'" Id. at 2406 (quoting Bradley, at 97)(brackets in original).

Citing Citizens for Responsible Behavior, the Plaintiffs claim that no rational basis exists to support Amendment 2. However, the Defendants have shown that, unlike Citizens, the much narrower Amendment 2 was not based upon negative stereotypes or irrational fears. As set forth in the Opening Brief, the legitimate goals supporting Amendment 2 include promoting associational and religious rights, maintaining the integrity of established civil right protections, and achieving statewide uniformity on this divisive issue. Even if these legitimate objectives could somehow be found wanting, Amendment 2 is nonetheless constitutional as expressing society's moral judgment that certain behavior or orientation should not be the basis for additional or special rights.[35]

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[35]The Plaintiffs erroneously claim that the Defendants have abandoned the position they took below (v. 6, p. 138-39) that the protection of traditional social values and structures was one of the permissible purposes underlying Amendment 2. Ans. brf. at 40 n.23. The Plaintiffs overlooked the Defendants' reference to Wisconsin v. Yoder, 406 U.S. 205 (1972). See Op. brf. at 42 n.50. The Yoder case recognizes "the values of parental direction of the

Initially, the Plaintiffs contend that moral judgment is no factor in this case, since the lower court purportedly found as a matter of fact that Amendment 2 was solely motivated by impermissible "private bias." However, the lower court made no findings of fact; even so the lower court could not have found that Amendment 2 was supported by biases based only on mere hostility or irrational stereotypes: the State had produced substantial evidence indicating that the amendment was grounded in part at least upon a moral component and that the voters had not approved it out of hate or hostility to homosexuals or bisexuals. See Defendants' Exhibit "C": Letter from Kevin Tebedo; Defendants' Exhibit "B": Talmey-Drake survey at 2, 4-5.

Moral judgment is readily distinguishable from mere hostility and irrational stereotyping; this was authoritatively settled in Bowers v. Hardwick, 478 U.S. 186 (1986). There, the dissent characterized the moral judgment underlying a statute prohibiting homosexual sodomy as impermissible bias of the type the Court condemned in Palmore v. Sidoti, 466 U.S. 429 (1984), United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973), and

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religious upbringing and education of their children in their early and formative years have a high place in our society." 406 U.S. at 213-24. Furthermore, "given its concern for perpetuating the values associated with conventional marriage and the family as the basic unit of society, the state has a substantial interest . . . in endeavoring to protect minors from being influenced by those who advocate homosexual lifestyles." J.P. v. P.W., 772 S.W.2d 786, 792 (Mo. App. 1989)(quoting Roberts v. Roberts, 22 Ohio App. 3d 127, 129, 489 N.E.2d 1067, 1080 (1985). See also County of Dane v. Norman, ___ N.W.2d ___, 1993 WL 113690 (Wis. Apr. 13, 1993) (county ordinance's requirement that landlords rent to "cohabitants" struck down because it conflicted with State's public policy of promoting stability of marriage and family).

Cleburne.[36] See Bowers v. Hardwick, 478 U.S. at 211-12 (Blackmun, J., dissenting). The majority disagreed. It did not hold, as the Plaintiffs would have this Court believe, only that "a moral motivation does not automatically invalidate a law" (Ans. brf. at 33); rather, it explicitly stated "We do not agree" that "majority sentiments about the morality of homosexuality should be declared inadequate" as a "rationale to support the law." 478 U.S. at 196. See also Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2462, 2467 (1991)(majority of Court agrees that standards of morality at least satisfy rational basis test).

In any event, the Plaintiffs do not dispute the legitimacy of the other stated purposes of Amendment 2, but rather argue that Amendment 2 is irrational because it is under- or over-inclusive.[37] However, neither under-inclusiveness nor over-inclusiveness, per se, invalidates a provision under the Equal Protection Clause. Vance v. Bradley, 440 U.S. at 108 (mandatory retirement scheme for

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[36]All three cases are heavily relied upon by the Plaintiffs here. The Plaintiffs' point out that Palmore has been applied in the lower courts in the context of homosexual custody disputes. See Ans. brf. at 31. It has also been rejected as having no application in that context as well. See S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. App. 1987). Moreover, Palmore, Cleburne, and Moreno all present different issues from this case, because they involve governmental coercion against private choice. Rather than prohibiting or punishing private decisions, Amendment 2 restricts government, protecting autonomy for private actors. It is the Plaintiffs who seek governmental intrusion into private affairs.

[37]The Plaintiffs also contend that the State's goal of maintaining the integrity of established civil rights programs -- upon which the State produced evidence in the form of testimony from the former head of the Colorado Civil Rights Commission (v. 6, pp. 14-18) -- is "obviously pretextual" (Ans. brf. at 43-45). Curiously, no reasoning accompanies this claim.

foreign service agents upheld). This is because "[p]erfection in making the necessary classifications is neither possible nor necessary." Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 306, 314 (1976)(mandatory retirement age for state police upheld). "The rational basis standard does not demand that legislatively created classifications be perfect, nor does it require that legislative action address the 'whole field of possible abuses.'" Montrose County School Dist. RE-1J v. Lambert, 826 P.2d 349, 351 (Colo. 1992). Indeed, as Justice William O. Douglas observed:

> Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others.

Williamson v. Lee Optical Co., 348 U.S. 483, 489 (1954). A measure is valid unless the under- or over-inclusiveness is "so severe that it cannot be said that the legislative classification 'rationally furthers' the posited state interest." Nordlinger v. Hahn, 112 S. Ct. 2326, 2344 (1992).

The Plaintiffs similarly misunderstand the State's interest in uniformity of civil rights laws: this particular justification was not designed to achieve a uniformity between federal and state law, but a uniformity within the State as to how homosexuals and bi-sexuals would be required to be treated.[38] Likewise, the amendment

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[38]The Plaintiffs wrongly represented, as a matter of fact, that heterosexuals are protected under state and local laws. But see v. 6, p. 47; v. 6, pp. 46-48; v. 5, p. 145; Defendants' Exhibit "C":

was designed to further religious liberty by ensuring that no local government will have the power to abridge religious liberty in this fashion. Finally, the amendment is not violative of equal protection simply because it could have gone further in promoting associational rights, or because it realigned one, but not all, aspects of federal and state law. The people are "free to recognize degrees of harm and . . . confine [their] restrictions to those classes of cases where the need is deemed to be clearest." Lambert, 826 P.2d at 351-52 (quoting Independent Dairymen's Ass'n, Inc. v. City & County of Denver, 142 F.2d 940, 942 (10th Cir. 1944)).[39]

An Analysis of 1992 Ballot Proposals at 11. Indeed, the Plaintiffs' witnesses related the major role homosexuals played in obtaining sexual orientation protections (v. 4, pp. 51-52, 169-71, 179-80, v. 5, pp. 49, 61, 141-45), and how objectionable it would be to enforce those protections only on behalf of heterosexuals (v. 5 pp. 22, 39).

All this, of course, supports the legal conclusion that the heterosexual component of present sexual orientation provisions would not have been enacted separately, and therefore could not exist apart from the homosexual and bisexual parts of such provisions. See generally 2 N. Singer, Sutherland Statutory Construction §§ 44.03-.09 (1986)(severability principles). Moreover, even if the heterosexual part of the sexual orientation provisions could independently survive severance analysis, any resulting equal protection problem would require the ordinance's invalidation, not the invalidation of Amendment 2.

[39]Indeed, Gregory v. Ashcroft is a good example of a classification which was to some extent both under-inclusive and over-inclusive. There, the Court reviewed a state constitutional provision requiring judges to retire upon reaching 70. The provision was designed to maintain physically and mentally qualified judges; obviously, judges could experience diminishment of their capacities at an age younger than 70, and "[i]t is far from true that all judges suffer significant deterioration in performance at age 70. It is probably not true that most do. It may not be true at all." 111 S. Ct. at 2407. Still, the Court held, the people "rationally could conclude that the threat of

It is beyond question that the stated purposes validate Amendment 2. This conclusion is not altered simply because Amendment 2 reaches beyond "conduct" to "status" or "orientation."[40] Contrary to the Plaintiffs' belief, Amendment 2 directs the State's police power against no one at all -- in fact, it effectively restricts the use of the police power. The only parties commanded to do anything are governmental entities, which are not subject to the police power,[41] but which rather must simply yield to the preemption of their authority by a higher law.[42] Amendment 2, "like all legal classifications, is founded on a generalization." Gregory v. Ashcroft, 111 S. Ct. at 2407. That

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deterioration at age 70 is sufficiently great, and the alternatives for removal sufficiently inadequate, that they will require all judges to step down aside at age 70." Id. at 2408. Here, the people had identified a particular problem relating to a number of personal liberties and sought to directly address it.

[40]The Plaintiffs also cite Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992) and Meinhold v. United States Dep't of Defense, 808 F. Supp. 1455 (C.D. Cal. 1993), appeal filed, No. 92-56439 (9th Cir. Mar. 3, 1993) as suggesting that more than mere "moral judgment" is necessary to sustain a classification based on "status." Even accepting their dubious reasoning, these cases are inapposite because other justifications, apart from generic "moral" ones, exist to support the amendment. Furthermore, the Plaintiffs neglect to mention that Meinhold is currently on appeal.

[41]"[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." New York v. United States, 112 S. Ct. 2408, 2421 (1992)(citing Coyle v. Oklahoma, 221 U.S. 688, 689 (1911)).

[42]As noted earlier, Amendment 2 does not place any criminal or civil disabilities upon homosexuals and bisexuals; it only repeals protections the federal Constitution does not require, see Crawford v. Board of Educ., 458 U.S. 527, 535-42 (1982), and leaves to future voters on a statewide basis the decision as to when, if ever, such protections might be desirable.

"generalization" is rationally related to the purposes of the amendment,[43] and the Plaintiffs cannot complain otherwise. They have themselves validated a "status" rather than "conduct" approach through seeking and supporting legislation which benefits them on the basis of their "status." If status is an appropriate basis for granting special legal protections, then it assuredly is an appropriate basis for denying them. Indeed, there is no other practical way of creating a meaningful classification in this area. Indeed, society would properly find repugnant the prospect of having to spy upon people to confirm their sexual activities. See Ben-Shalom v. Marsh, 881 F.2d 454, 463-64 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990).

CONCLUSION

For the foregoing reasons, the lower court's judgment must be reversed, and its order granting a preliminary injunction vacated.

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[43]For example, if an employer was seeking a trustworthy employee, he could ask "Has the applicant ever stolen anything?" or "Is the applicant honest?" The first question relates to conduct, the second to status. Not only is the second question permissible, it is also more important.

Respectfully submitted this 17th day of May, 1993.

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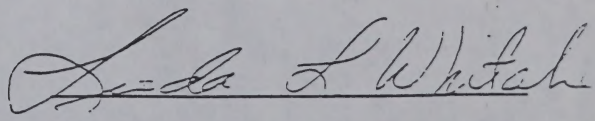

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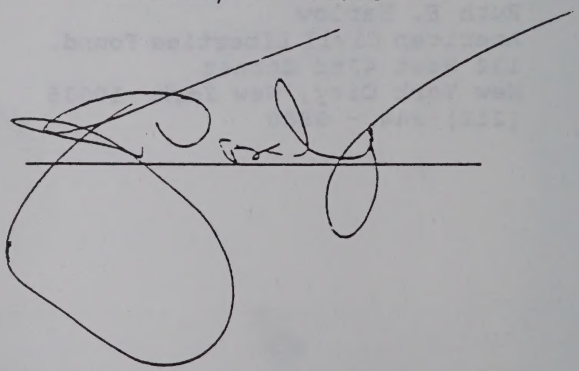

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